United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7367

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7367

ROBERT P. KOCH, KEVIN P. RYAN, JOHN J. WILSON, Captains of Police, PHILIP BOHRER, JAMES L. JUDGE, WILLIAM WIESE, Lieutenants of Police, RICHARD BECK, JOSEPH BIBBIGLIA, CHARLES CASEY, JAMES CLARK, EDWARD EASTWOOD, JOHN GALANTINI, RONALD GOULDNER, REGINALD GREENIDGE, RUSSLAN HOFFMAN, JAMES KEELS, JOHN MURRAY, LAWRENCE PALLADINO, Sergeants of Police, New York City Transit Authority,

Plaintiffs-Appellants,

—against—

DAVID L. YUNICH, Chairman and Chief Executive Officer, New York City Transit Authority, and ALPHONSE E. D'AMBROSE, Personnel Director and Chairman of the Civil Service Commission, City of New York,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE DAVID L. YUNICH, CHAIRMAN NEW YORK CITY TRANSIT AUTHORITY

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BRIEF FOR DEFENDANT-APPELLEE DAVID L. YUNICH, CHAIRMAN NEW YORK CITY TRANSIT AUTHORITY

Issue Presented

Was the court below correct in denying plaintiffs' motion for a preliminary injunction and dismissing the complaint?

Statement of the Case

Plaintiffs are police officers of various ranks above patrolmen in the employ of the New York City Transit Au-

thority. Pursuant to New York Public Authorities Law §§1210(2) and 1204(16), they have acquired their positions through the civil service system. They challenge, on various contitutional and statutory grounds, a procedure mandated by statute and administrative direction whereby they could be demoted or separated from service because of economic difficulties facing the defendant employer. This procedure, as delineated in a directive of defendant Alphonse D'Ambrose, the Personnel Director of the City of New York, requires that demotion be made in the inverse order of seniority from the date of original permanent appointment in classified service with certain preferences being given to veterans. Plaintiffs claim that this procedure is illegal and seek instead to have the defendants adopt a different procedure, where demotions or separation from service would be determined by the length of service in the particular position one occupies (brief, p. 9).

Plaintiffs sought (1) the convening of a three-judge Court pursuant to 28 U.S.C. §§ 2281 and 2284(2) a declaratory judgment pursuant to 28 U.S.C. §§ 1343(3), 2201 and 2202, that New York Civil Service Law §§ 80 and 85 are null and void insofar as they mandate demotion or separation from service on any basis other than merit and fitness and seniority in a position, and (3) a permanent and temporary injunction against the defendants.

Facts

The plaintiffs are Sergeants, Lieutenants and Captains in the New York City Transit Police Department, the expenses of which are assumed by the City. They challenge the statutory plan and administrative procedure which could be used to demote or terminate them from their positions because of economic problems now facing the City

of New York (20)*. The defendants are David L. Yunich, the Chairman of the New York City Transit Authority and Alphonse D'Ambrose, the Personnel Director and Chairman of the Civil Service Commission of the City of New York.

The plaintiffs challenge the criteria contained in New York Civil Service Law §§ 80 and 85 whereby those with more total service in the employ of the public agency are given preference in retention of their positions on the basis that preference should be given to those with more seniority *in the particular position which they hold.* The plaintiffs allege that they are threatened with demotion and that they have held their particular positions as Captains, Lieutenants and Sergeants longer than some other police officers in these titles who are not threatened with demotion (6-7).

Plaintiffs assert that this method of dealing with current economic difficulties violates a number of constitutional and statutory provisions. They allege that they are threatened to be deprived of civil rights under color of state law in violation of 42 U.S.C. § 1983(3), and that the procedure which could be used violates Article 5, § 6 of the New York State Constitution, which requires that civil service appointments be made on the basis of "merit and fitness" and provides that a preference may be given to veterans for appointments and promotions (4, 8-9).

Plaintiffs also allege that the proposed method of demotion violates Article 5, § 7 of the New York State Constitution which makes their pension benefits contractual rights and that the constitutional prohibition against interference with contracts is violated (14, 17-18).

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* Numbers in parentheses, unless otherwise indicated, refer to the pages of the Appendix.

Plaintiffs further allege that the termination procedure creates two classes with respect to "merit and fitness" without any reasonable basis in that those in the positions occupied by the plaintiffs have their "merit and fitness" determined partially by seniority, whereas those in the lower rank of Patrolman have their "merit and fitness" determined wholly by competitive examination (16).

Plaintiffs also further allege that the maintenance of a Detective Division by the defendant Yunich pursuant to New York Public Authorities Law § 1204(16) violates the "merit and fitness" requirement of the State Constitution and § 1210(2) of the New York Public Authorities Law which provides that "The appointment, promotion and continuance of employment of all employees of the authority shall be governed by the provisions of the civil service law," in that there is no competitive examination for the position of detective (11-13).

It is also alleged that one-third of the plaintiff sergeants are black and that since, it is alleged on information and belief, these employees have entered civil service "in numbers disproportionately greater and at dates more recent than other employees", the criterion for demotion has a greater adverse impact upon them (15-16).

Plaintiffs also claim a violation of their property rights and substantive due process (17) as well as procedural due process (18). Although plaintiffs alleged that they were to be demoted on June 30, 1975 (7) it is especially significant that, as of this date, none of the plaintiffs have been notified of any plan or order to demote or separate them from service.

Proceedings Below

This action was commenced by complaint filed in the United States District Court for the Eastern District of New York on June 13, 1975. Plaintiffs brought on their motion for a preliminary injunction, which resulted in the dismissal of the complaint, by order to show cause returnable June 20, 1975. The motion was heard and denied by Senior District Judge BRUCHHAUSEN. In an affidavit submitted to the Court below, and served upon the attorney for the plaintiffs, the attorney for defendant Yunich requested that the plaintiffs' motion be denied. Through inadvertence, this affidavit was not immediately filed with the Clerk of the Court. The attorneys for defendant Yunich subsequently arranged for that affidavit, which was in the District Court file, to be docketed by the Clerk on October 22, 1975 in order for it to be transmitted to this Court and be available for inspection on this appeal.

The District Court, in an order filed June 20, 1975, dismissed the complaint. Plaintiffs filed their notice of appeal on the same day. Plaintiffs moved in this Court for a preference in hearing this appeal on June 24, 1975. This Court (Clark, Mansfield, Mulligan, *JJ.*) denied that motion on the same date.

On June 30, 1975, these same plaintiffs commenced an action in the New York State Supreme Court, Kings County, pursuant to Article 78 of the New York Civil Practice Law and Rules against the same defendants herein, seeking the identical relief which is sought in this action. Indeed, the complaint in this action is virtually the same as the petition served in the Article 78 proceeding. That Article 78 proceeding was concluded by order of the New York Supreme Court (Rubin, *J.*) entered on October 7, 1975, granting the defendants' motion for summary judg-

ment and rendering a declaratory judgment in defendants' favor (N.Y.L.J., October 1, 1975, p. 10, col. 5). For the convenience of the Court, this opinion is printed as an addendum to this brief. Plaintiffs served a notice of appeal to the Appellate Division from the state court judgment on October 24, 1975. Having been unsuccessful in the state Supreme Court plaintiffs have now returned to the federal courts with this appeal.

Statutes Involved

Civil Service Law § 80(1) provides in pertinent part:

§ 80. Suspension or demotion upon the abolition or reduction of positions

1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the aboli-

tion or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

Civil Service Law § 85(7) provides in pertinent part:

§ 85. Additional credit allowed veterans in competitive examinations; preference in retention upon abolition of positions

7. Preference in retention upon the abolition of position. In the event of the abolition or elimination of any position in the civil service for which eligible lists are established or any position the incumbent of which is encompassed by section eighty-a of this chapter, any suspension, demotion or displacement shall be made in the inverse order of the date of original appointment in the service subject to the following conditions: (1) blind employees shall be granted absolute preference in retention; (2) the date of such original appointment for disabled veterans shall be deemed to be sixty months earlier than the actual date, determined in accordance with section thirty of the general construction law; and (3) the date of such original appointment for non-disabled veterans shall be deemed to be thirty months earlier than the actual date, determined in accordance with section thirty of the general construction law.

POINT I

The complaint is now barred by *res judicata.*

This case is before this Court in a rather unusual posture. After the dismissal of the complaint by the District Court, the plaintiffs initiated a proceeding in the New York State Supreme Court seeking the same relief on virtually identical grounds. As such, even if the complaint could be sustained as sufficient, it would have to be dismissed on the basis of *res judicata.* As demonstrated by the opinion of the New York court, reproduced in the addendum, the plaintiffs' alleged cause of action against identical defendants has already been fully and fairly litigated. As has been noted by the authorities:

> "A final judgment on the merits, rendered by a court of competent jurisdiction, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand and cause of action, whether the plaintiff fails to recover in the first action, or is successful in recovering a part of his claim. The judgment puts an end to the cause of action, which cause cannot again be brought into litigation between the parties upon any ground, or for any purpose whatever, in the absence of some factor invalidating the judgment. In such case, the res which is judicata is the cause of action." 46 Am. Jur. 2d *Judgments* § 404

As there has been a judgment on the merits by a state court of competent jurisdiction on the claims of the plaintiffs, the District Court could not properly re-hear the matter, even if the complaint could properly be reinstated. As the court ruled in *Frazier* v. *East Baton Rouge Parish*

School Board, 363 F. 2d 861 (5th Cir. 1966): "If state administrative action is first challenged in the state court, and the state court acts judicially, the state court decision is *res judicata*, and bars a decision by a federal court. *Bacon* v. *Rutland R. Co.*, 1914, 232 U.S. 134, 34 S. Ct. 283, 58 L.Ed. 538; *Prentis* v. *Atlantic C.L. Co.*, 1908, 211 U.S. 210, 29 S. Ct. 67, 53 L.Ed. 150; 3 Davis, Administrative Law Treatise, p. 368 (1958). Under the doctrine of *res judicata*, where the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action."

Res judicata is supported by the doctrine of full faith and credit (1B Moore's Federal Practice § 0.405) and the law of the state governs as to the conclusiveness of a judgment. In New York, a judgment operates as *res judicata* even while an appeal is pending. *Goldfarb* v. *Wright*, 135 F. 2d 188 (2d Cir. 1943).

While the plaintiffs did not specifically raise a violation of 42 U.S.C. § 1983 in the state court proceeding, it certainly could have been raised. The state courts have jurisdiction to entertain actions under § 1983. *Long* v. *District of Columbia*, 469 F. 2d 927, 937 (D.C. Cir. 1972); *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970). State courts in New York, as well as other jurisdictions, have entertained causes of action under § 1983. *Holt* v. *City of Troy*, 78 Misc. 2d 9 (Sup. Ct., Rensselaer Co. 1974), *New Times Inc.* v. *Arizona Board of Regents*, 110 Ariz. 367, 519 P. 2d 169, 176 (1974); *Dudley* v. *Bell*, 50 Mich. App. 678, 213 N.W. 2d 805 (1973).

As it is a cause of action which could properly have been raised in the state court proceeding, and indeed arises out of the same facts, plaintiffs' § 1983 claim, as well as their

other causes of action, are barred by *res judicata*. *Res judicata* bars not only the specific legal claim raised in a prior proceeding, but also that which might have been raised. *Israel* v. *Wood Dolson Co.*, 1 NY 2d 116 (1956), *Frazier* v. *East Baton Rouge Parish School District, supra.* The federal courts have barred § 1983 claims on the grounds that they could have been raised in prior state proceedings. *Taylor* v. *New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970); *Spence* v. *Latting*, 512 F.2d 93 (10th Cir. 1975).

POINT II

The court below was correct in dismissing the complaint since it fails to establish any basis for relief.

(A) *The provisions of the Civil Service Law governing suspensions or demotions for economic reasons accord with due process requirements.*

Plaintiffs first assert that such demotions or suspensions by respondents are violative of the 14th amendment because they are made, pursuant to § 80 of the Civil Service Law, according to the inverse order of original appointment rather than appointment to a particular title. A challenge to legislative action such as this on substantive due process grounds must fail if there is any rational basis for the statutory scheme, *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). Such a rational basis exists in the determination by the Legislature to reward the total length of employment in government service, and to keep employees with more overall experience than employees more recently hired.

Plaintiffs cite *Slochower* v. *Bd. of Education*, 350 U.S. 551 (1956), which held that an employee's dismissal for

asserting his fifth amendment right, without notice and a hearing, was improper, and the later lines of cases dealing with the right to a hearing in certain situations before substantial rights are infringed by the state. With respect to government employees, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) define those property or liberty "interests" in employment which would necessitate a hearing. Such interests do not exist in the case at bar.

The "liberty" guaranteed by the 14th amendment in this context was defined by the Court as the freedom to take advantage of other employment opportunities. Thus, if an employee is removed for reasons that would affect his standing and association in the community, notice and an opportunity to be heard are required. Demotions for economic reasons do not in any way impugn an employee's good standing or reputation, or foreclose the opportunity to "take advantage of other employment opportunities" *Roth, supra* at 573.

Nor do plaintiffs demonstrate any protected property interest. The Court made clear that there must be some "legitimate claim of entitlement" to the benefit, and that:

> "Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . 408 U.S. at 577."

Plaintiff in *Roth*, a non-tenured college professor, was employed under a one-year contract, and at the end of the year his contract was not renewed by the University. The Court held that he had no legitimate claim of entitlement that warranted due process protection since his "property interest in employment was created and defined by the

terms of his appointment" and did not extend beyond that first year.

In *Arnett* v. *Kennedy, supra,* the Court reaffirmed the principle that an expectancy or the extent of a property interest in a job can be defined by the statutory or contractual terms of appointment, especially since, absent any such statutory grant, the governmental employer would have "virtually uncontrolled latitude in decisions as to hiring and firing (citation omitted)". *Id.* at 152. Similarly, in the instant case the extent of plaintiffs' property rights are defined by the Civil Service Law and the Rules and Regulations pursuant to which they were appointed, which condition job retention on economic feasibility. Thus, it is conclusively established by the statute that there is no legitimate expectancy or claim of entitlement once it becomes necessary to impose demotions for budgetary reasons, and a hearing is not required prior to such demotions.

Moreover, economic lay-offs or demotions are distinct from removals for misconduct or incompetency. The question of a hearing arises in these latter cases of removal "for cause", as it did in *Arnett, supra,* and § 75 of the Civil Service Law appropriately provides for notice and a hearing in such situations. In the case of economic demotions, which do not involve any exercise of discretion, and where the public employer must follow the mandate of § 80 of the Civil Service Law, a hearing has never been required.

This difference and the right to demote for economic reasons pursuant to § 80 has long been recognized by the courts of New York. *Peo. ex rel. De Vito* v. *Sayer,* 233 N.Y. 615 (1922); *Peo. ex rel. Davison* v. *Williams,* 213 N.Y. 130 (1914).

Thus, in *Felder* v. *Fullen*, 27 N.Y.S. 2d 699 (Sup.Ct., N.Y. Co. 1941), *aff'd*, 263 App. Div. 986 (1st Dept 1942), *aff'd*, 289 N.Y. 658 (1942), in dismissing an Article 78 proceeding brought by an employee of the Transit Commission who had been laid off, the court held, at page 703:

> "The Transit Commission had the power to discontinue the petitioner's services for reasons of economy and because of lack of appropriation. Upon abolition of the position, petitioner, whether or not he was in the competitive civil service, was only entitled to have his name placed upon a state preferred list. *Clancy* v. *Halleran*, 263 N.Y. 258, 188 N.E. 746; *Edkins* v. *Wetherspoon*, 173 App. Div. 330, 332, 158 N.Y.S. 710."

A similar result was reached in *Matter of Lippmann* v. *Delaney*, 48 AD2d 913 (2nd Dept. 1975), where the court affirmed the dismissal of a proceeding brought by a Deputy Sheriff of Westchester County whose position was eliminated due to budgetary restrictions.

Plaintiffs, therefore, fail to establish any claims based on substantive or procedural due process grounds.

It should be noted at this point that petitioners also raise the argument that the designation of certain patrolmen as detectives somehow establishes the arbitrariness of § 80. They also challenge these designations as contrary to the "merit and fitness" requirements of Article 5, § 6 of the N.Y. State Constitution. Both these arguments are without merit. Such assignments, as authorized by Public Authorities Law § 1204, subd. 16, are not part of the classified civil service and are within the Authority's discretion. Further, the courts have held that these designations, which do not constitute a promotion or change in grade, do not violate either Article 5 of the Constitution or the Civil Service Law. *Detective Endowment Assn.*

v. *Leary*, 36 A D 2d 289 (1st Dept. 1971), *aff'd*, 30 N Y 2d 577 (1972); *Hagan* v. *Murphy*, 39 Misc. 2d 82 (Sup. Ct., N.Y. Co. 1963), *aff'd*, 19 A D 2d 862 (1963), *aff'd*, 14 NY 2d 701 (1964).

Similar reasoning also defeats any challenge to § 85 of the Civil Service Law which establishes the procedures for applying veterans' credits in determining suspensions or demotions. This provision is consistent with Article 5, § 6 of the State Constitution which limits the use of additional veterans' credits to one occasion as to appointments and promotions only and does not affect any property rights plaintiffs may have.

(B) ***No basis for relief is demonstrated under the equal protection clause of the 14th amendment.***

Plaintiffs challenge to any action of respondents on equal protection grounds must also fail. The first ground asserted in this regard is that plaintiffs are treated differently than patrolmen who may be demoted according to their position on the civil service list from which they were appointed. This argument is fallacious. Both plaintiffs and patrolmen are demoted in the inverse order of original appointment according to Civil Service Law §§ 80 and 85. There are patrolmen who have prior service in other civil service titles, which service is credited to them for economic layoff purposes. However, since most patrolmen are in an entry level position, their original date of appointment and their date of appointment to the position of patrolman are the same.

To the extent that plaintiffs challenge the demotions as contrary to the merit and fitness requirement of Article V, § 6 of the State Constitution, they are also incorrect. This section provides that "appointments and promotions . . . shall be made according to merit and fitness to be ascer-

tained as far as practicable, by [competitive] examination." The appointment and promotion of all members of the uniformed transit police have been made on the basis of merit and fitness. The Constitution does not require, as plaintiffs suggest, that in computing seniority for layoffs or demotions credit cannot be given for other than service in the police force such as military service in time of war or other non-competitive public employment. As to the designation of detectives, the validity of such designations has been established *supra* at p. 13.

No claims are stated on these grounds, and no federal question is raised despite the attempt to construct an equal protection argument.

Finally, petitioners assert discrimination on the basis of race and color. This argument must fail for different reasons. Plaintiffs do not allege any racially improper motives on the part of defendants but rather that the demotions would produce "an adverse impact upon employees of black and minority groups greater than upon other employees." (15) However, they do not allege any statistical data or reasoning to support the claim. Indeed, the only figures put forth by plaintiffs indicate an almost perfectly equal ratio between plaintiff sergeants, the only plaintiffs alleged to be members of minority groups, and the number of minority member employees.

Although the allegations of the complaint may be treated as true in deciding whether to dismiss, *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-422 (1969), the court will not accept unsupported conclusions, *Powell* v. *Jarvis*, 460 F. 2d 551, 553 (2nd Cir. 1972); *Powell* v. *Workmen's Comp. Bd. of N.Y.*, 327 F. 2d 131 (2nd Cir. 1964) or unwarranted inferences, *Hiland Dairy Inc.* v. *Kroger Co.*, 402 F. 2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

In summary, plaintiffs have not stated any cause of action based on the equal protection ground in the application of the Civil Service Law, which is racially neutral on its face and in its operation. Further, there is no evidence, nor could there be, of any "prior discrimination which would cast doubt upon the otherwise legitimate nature of the action taken." *Towns* v. *Beame*, 386 F. Supp. 470, 474 (S.D.N.Y. 1974).

(C) ***The contractual rights of the plaintiffs have not been impaired.***

Plaintiffs allege that in the event that they are demoted or separated from service pursuant to Civil Service Law §§ 80 and 85, due to economic considerations, their pension rights will be adversely affected because their pensions are computed based upon the salary they would earn in their present positions. This, they allege, would be in violation of Article 1, § 10, clause 1 of the U.S. Constitution, which prohibits impairment of contracts by the states (14-15). Article 5, § 7 of the New York State Constitution makes membership in a pension system a contractual obligation of the state.

Plaintiffs' claims are without merit as a matter of law. If plaintiffs' theory could be upheld, once a public employee attained any position he could not be demoted because of economic considerations on any basis—either seniority in service or in position. This could not be the thrust or intention of the constitutional prohibition against impairment of contracts by the states.

As the Supreme Court noted in *Home Building and Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 428 (1934):

> "To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibi-

tion is not an absolute one and is not to be read with literal exactness like a mathematical formula."

Plaintiffs could never have reasonably assumed that the civil service positions which they hold would never be affected by economic considerations or that certain positions would never be abolished. The Legislature has specifically provided how positions would be eliminated in such a situation in Civil Service Law § 80.

If plaintiffs were to be demoted, they would be performing duties of correspondingly less responsibility. They would not lose their inchoate pension rights—their pensions would perhaps, in the future, reflect that lesser responsibility.

Plaintiffs may have contractual rights but "[L]aws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of contract." *City of El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965), *rehearing denied* 380 U.S. 926 (1965). This principle applies equally to laws which affect contractual public employee pensions. *Lyon* v. *Flournoy*, 76 Cal. Rptr. 869, 271 C.A. 2d 774 (1969), appeal dismissed 396 U.S. 274 (1970).

As stated by one New York Court: "The establishment of a salary, fixed by a municipal body, is not a benefit that cannot be diminished. Salaries may be varied, they may be increased or decreased, and the pensions granted thereunder may vary accordingly (*Hoar* v. *City of Yonkers*, 295 N.Y. 274)." *Doyle* v. *Wright*, 201 Misc. 884 (Sup. Ct., Westchester Co. 1951). It has been held that a police officer's contractual pension rights do not bar his dismissal for cause and subsequent loss of pension. *Robbins* v. *Police Pension Fund*, 321 F. Supp. 93 (S.D.N.Y. 1970).

Summary

Plaintiffs fail to demonstrate any basis for relief, even assuming the truth of the allegations in their complaint. Consequently, they also fail to raise any "substantial federal question" which would warrant the convening of the three judge court pursuant to 28 U.S.C. §§ 2281 and 2284. *Water Service Co.* v. *Redding*, 304 U.S. 252 (1938); *Heaney* v. *Allen*, 425 F. 2d 869 (2nd Cir. 1970).

CONCLUSION

The decision of the court below dismissing the complaint should be affirmed.

November 3, 1975

Respectfully submitted,

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Opinion of New York State Supreme Court

MEMORANDUM

SUPREME COURT
KINGS COUNTY

(SPECIAL TERM, PART III)

By RUBIN, J.

Dated September 26, 1975

ROBERT P. KOCH, *et al.*,

Petitioners,

vs.

DAVID L. YUNICH, etc., *et al.*,

Respondents.

This Article 78 proceeding was originally brought for the purpose of restraining the respondent officials of the New York City Transit Authority and the City of New York from instituting certain layoffs and demotions of petitioners because of the city's economic crisis.

By memorandum decision dated July 24, 1975 and order entered September 5, 1975, this court, per Mr. Justice Multer, denied a cross motion to dismiss made by respondents and also denied petitioners' motion for a temporary injunction. In so doing, Judge Multer, in effect, ruled that even though no actual layoffs had been threatened or were anticipated, petitioners are entitled to a declaration as to their rights.

Upon referral of this matter to Special Term, Part III, both sides move for summary judgment agreeing that there is no conflict as to the facts of this case. The is-

sues to be determined are strictly matters of law. This court will proceed to determine these matters and thereby render declaratory judgment.

The petitioners, all police officers above the rank of patrolmen in the New York City Transit Authority Police Department, challenge the constitutionality and legality of certain provisions of law which result in petitioners having less retention rights than some other employees of respondents. Examination of the pleadings reveals that several of the claims have no basis at all and should not be considered. The remaining claims can be listed as follows:

1. Civil Service Law, Section 80, as it gives retention rights based on years of service in a governmental subdivision or agency rather than in a particular title, is unconstitutional.

2. No dismissals may be had without a hearing.

3. The appointment of certain patrolmen as detectives impairs petitioners' rights.

4. The granting of retention preference to veterans is unconstitutional.

Section 80 of the Civil Service Law provides for suspension or demotion of governmental employees upon the abolition or reduction of positions "in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs."

This provision has the effect of favoring tenure in a department over tenure in a position. This may be illustrated by the following example:

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> Police Officer "A" entered the department in 1955, became a sergeant in 1968, a lieutenant in 1970 and a captain in 1972, all by virtue of competitive examinations. Police Officer "B" entered the department in 1960 and was promoted through competitive examinations as follows: sergeant in 1965, lieutenant in 1967, captain in 1968. Pursuant to Section 80 Officer "A" would be entitled to greater retention rights in the position of captain than Officer "B".

This result seems to work against the more diligent and ambitious officer who has risen rapidly through the ranks. In the above example, a man who was a patrolman at the time the other man was a captain gains greater retention rights to the position of captain.

While the court can sympathize with the plight of a person adversely affected by this law, the Legislature, in its wisdom, has established this system. Good faith, abolition of positions due to fiscal limitations have recently again been upheld by the Appellate Division, Second Department (*Matter of Lippman*, —— A.D. 2d ——, N.Y.L.J. 7/8/75, p. 15, col. 5).

This court can find no constitutional prohibition to the system established by Section 80 to carry out the dismissals or demotions which result therefrom. Although the result may not be equitable, it cannot be adjudged to be either illegal or unconstitutional.

Certainly, this provision is not violative of the "merit and fitness" requirements of Article 5, Section 6 of the New York Constitution. The Legislature is entitled to decide that it is better to keep older employees with more overall experience than employees more recently hired who have more time in a particular position.

The right to a hearing prior to dismissal or demotion of a police officer, as provided in Section 891 of the Unconsolidated Laws, is inapplicable to this case. Such hearings are required where one is removed for cause rather than for economic reasons (see *Dunne* v. *Beame*, Sup. Ct., N.Y. Co. N.Y.L.J. 9/17/75, p. 9). In such a case no discretion need be exercised. The public employer must follow the mandate of Section 80 of the Civil Service Law.

The claim that the designation of certain patrolmen as detectives wastes money and thus impairs petitioners' rights is without merit. Such assignments are within the discretion of the Transit Authority and have been upheld by the courts (*Hagen* v. *Murphy*, 14 N Y 2d 701; Public Authorities Law, § 1204, subd. 16).

The question of veteran's credit for retention purposes is resolved by a reading of Section 85 of the Civil Service Law as well as Article 5, Section 6 of the New York Constitution. The constitution limits the use of veteran's credit to one time in the case of appointments or promotions. This has been held to be independent of any rights to retention of a position (*Wolf* v. *Delaney*, 266 N.Y. 262). This grant of additional retention rights to veterans by the Legislature cannot be deemed in violation of that constitutional provision.

In view of the foregoing determinations as to the questions raised by petitioners, and the failure to overcome the presumption of constitutionality attached to any legislative act, the court renders the following declaration:

1. Sections 80(1) and 85(7) of the Civil Service Law as well as Section 1204(16) of the Public Authorities Law are constitutional and are proper legislative enactments within the discretion of the legislative bodies of this state.

2. Section 891 of the Unconsolidated Laws does not apply to dismissals or demotions made pursuant to Section 80 of the Civil Service Law.

3. All other claims raised in the petition have not been shown to amount to any unconstitutional or illegal action on the part of respondents.

Accordingly, all relief demanded in the petition is denied.

Settle judgment.

/s/ CHARLES R. RUBIN
J.S.C.

Copy Received
this 6th day November 1975
Frederick J Ludwig
Asst. Corp. Counsel

THREE COPIES OF THE WITHIN PAPER
HAVE THIS DAY BEEN RECEIVED AT THE
OFFICE OF THE CORPORATION COUNSEL

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CORPORATION COUNSEL